

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

THOMAS BURDSAL,

Plaintiff,

v.

SCOTT DAVIS, *et. al.*,

Defendants.

Case No. 3:23-cv-00074-CLB

**ORDER GRANTING MOTION
TO SUBSTITUTE DOE DEFENDANTS
AND DENYING MOTION FOR
COUNSEL**

[ECF Nos. 29, 30]

Before the Court is Plaintiff Thomas Burdsal's ("Burdsal") motion to substitute Doe Defendants, (ECF No. 29), and motion for appointment of counsel, (ECF No. 30). Defendants Charles Daniels ("Daniels"), Scott Davis ("Davis"), Tim Garrett ("Garrett"), and Kara LeGrand ("LeGrand") (collectively referred to as "Defendants") filed a non-opposition to the motion to replace Doe Defendants, (ECF No. 31), and a response to the motion for appointment of counsel, (ECF No. 32). Each motion is discussed in turn.

I. MOTION TO REPLACE DOE DEFENDANTS

On June 26, 2023, the District Court screened Burdsal's complaint, (ECF No. 8), and allowed him to proceed on: (1) First Amendment free exercise claim will proceed against Defendants Davis, Garrett, LeGrand, Daniels, and Doe Members of the Religious Review Team ("RRT"); (2) Religious Land Use and Institutionalized Person Act claim will proceed against Defendants Davis, Garrett, LeGrand, Daniels, and Doe Members of the RRT; (3) Fourteenth Amendment equal protection claim will proceed against Defendants Davis, Garrett, LeGrand, Daniels, and Doe Members of the RRT; and (4) claim for intentional infliction of emotional distress will proceed against Defendants Davis, Garrett, LeGrand, Daniels, and Doe Members of the RRT. (ECF No. 7.) Burdsal was specifically advised that if the true identity of any of the Doe Defendant(s) came to light during discovery, Burdsal could move to substitute the true names of those Does to assert claims against them at that time. (*Id.* at 6, n. 2.)

1 Burdsal has now filed a motion to replace the Doe Members of the RRT with
2 Chaplains Donald Burse, Dana Everage, Chad Venters, Cary Dyer, March Mallinger, and
3 Julio Calderin. (ECF No. 29.) Burdsal's motion states that he learned of the Doe's identities
4 through discovery. (*Id.* at 2.) In response to the motion, Defendants state they do not
5 oppose Burdsal's motion to the extent it is requesting to substitute the Doe Defendants
6 pursuant to the screening order as the motion is timely and based on good cause. (ECF
7 No. 31.) Pursuant to Local Rule 7-2(d), the failure of an opposing party to file points and
8 authorities in response to any motion shall constitute a consent to the granting of the
9 motion.

10 For good cause appearing, the Court finds that Burdsal may properly substitute the
11 above-named defendants for the Doe Defendants as allowed in the screening order and
12 thus the motion is granted. Additionally, pursuant to Local Rule 7-2(d), the failure of an
13 opposing party to file points and authorities in response to any motion shall constitute a
14 consent to the granting of the motion. Thus, the Court finds that the motion should also be
15 granted based on Defendants' non-opposition.

16 **II. MOTION FOR APPOINTMENT OF COUNSEL**

17 Next, Burdsal filed a motion for appointment of counsel. (ECF No. 30.) Defendants
18 filed a response stating they do not take any position as to the motion. (ECF No. 32.)

19 There is no constitutional right to appointed counsel in a § 1983 action. *E.g., Rand*
20 *v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997), *opinion reinstated in pertinent part*, 154
21 F.3d 952, 954 n.1 (9th Cir. 1998) (en banc). The provision in 28 U.S.C. §1915(e)(1) gives
22 the court discretion to "request an attorney to represent any person unable to afford
23 counsel." 28 U.S.C. § 1915(e)(1); *see, e.g., Wilborn v. Escalderon*, 789 F.2d 1328, 1331
24 (9th Cir. 1998) (en banc.) While the decision to request counsel lies within the discretion
25 of the district court, the court may exercise this discretion to request counsel only under
26 "exceptional circumstances." *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991).

27 A finding of "exceptional circumstances" requires the court to evaluate (1) the
28 plaintiff's likelihood of success on the merits and (2) the Plaintiff's ability to articulate his

1 claims *pro se* considering the complexity of the legal issues involved. *Id.* (quoting *Wilborn*,
2 789 F.2d at 1331) (internal quotation marks omitted). Neither factor is dispositive, and both
3 factors must be considered before a court decides. *Id.* The difficulties every litigant faces
4 when proceeding *pro se* does not qualify as an exceptional circumstance. *Wood v.*
5 *Housewright*, 900 F. 2d 1332, 1335-36 (9th Cir. 1990). While almost any *pro se* litigant
6 would benefit from the assistance of competent counsel, such a benefit does not rise to
7 the level of “exceptional circumstances.” *Rand*, 113 F.3d at 1525. Rather, the plaintiff must
8 demonstrate that he is unable to articulate his claims due to their complexity. *Id.*

9 The motion for appointment of counsel states the substantive issues and
10 procedural matters are too complex for Burdsal’s comprehension and abilities, and by
11 reason of his incarceration, Burdsal cannot effectively investigate or litigate his claims.
12 (ECF No. 30.)

13 Exceptional circumstances do not exist in this instance. Burdsal only makes
14 conclusory assertions that this case is complex, however his claims do not involve
15 particularly complex issues, nor will they require expert assistance to understand.
16 Moreover, throughout the pendency of this action, Burdsal has demonstrated that he can
17 articulate his claims to the Court. While Burdsal contends that he has limited knowledge
18 in these types of proceedings, such lack of education and experience is unexceptional
19 compared to most prisoner civil rights cases. Accordingly, because Burdsal has not
20 demonstrated exceptional circumstances, the Court denies the motion. (ECF No. 30).

21 **III. CONCLUSION**

22 Accordingly, **IT IS HEREBY ORDERED** that Burdsal’s motion to replace Doe
23 Defendants, (ECF No. 29), is **GRANTED**.

24 **IT IS FURTHER ORDERED** that Defendants Donald Burse, Dana Everage, Chad
25 Venters, Cary Dyer, March Mallinger, and Julio Calderin shall be added to the docket as
26 defendants in this action.

27 **IT IS FURTHER ORDERED** that within 21 days of the date of entry of this order,
28 the Attorney General’s Office shall file notice advising the Court and Burdsal of whether it

1 can or cannot accept service on behalf of Defendants Donald Burse, Dana Everage, Chad
2 Venters, Cary Dyer, March Mallinger, and Julio Calderin. If the Attorney General's Office
3 cannot accept service on behalf of Donald Burse, Dana Everage, Chad Venters, Cary
4 Dyer, March Mallinger, and Julio Calderin, the Office shall file, under seal, but shall not
5 serve on Burdsal, the last known address of Donald Burse, Dana Everage, Chad Venters,
6 Cary Dyer, March Mallinger, and Julio Calderin, if it has such information. If the last known
7 address of Donald Burse, Dana Everage, Chad Venters, Cary Dyer, March Mallinger, and
8 Julio Calderin is a post office box, the Attorney General's Office shall attempt to obtain
9 and provide the last known physical address. If service cannot be accepted for Donald
10 Burse, Dana Everage, Chad Venters, Cary Dyer, March Mallinger, and Julio Calderin,
11 Burdsal shall file a motion requesting issuance of a summons, specifying a full name and
12 address for Donald Burse, Dana Everage, Chad Venters, Cary Dyer, March Mallinger, and
13 Julio Calderin.

14 **IT IS FURTHER ORDERED** that Burdsal's motion for appointment of counsel, (ECF
15 No. 30), is **DENIED**.

16 **IT IS SO ORDERED.**

17 **DATED:** July 10, 2024

18 
19 **UNITED STATES MAGISTRATE JUDGE**